NO. 89-1821

MAY 18 1990

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In the
Supreme Court of the United States

OCTOBER TERM, 1989

CHARLES Z. STEVENS, III
Petitioner

VS.

UNITED STATES DEPARTMENT
OF THE TREASURY;
NICHOLAS F. BRADY, Secretary,
U. S. DEPARTMENT OF THE TREASURY
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS VIOLATE THE UNAMBIGUOUS LANGUAGE OF THE **ADEA** AND/OR CONTROLLING PRECEDENT OF THIS COURT IN DECIDING THAT A FEDERAL EMPLOYEE'S TIMELY FILING UNDER 29 U.S.C. § 633a(d) OF A NOTICE OF INTENT TO FILE CIVIL ACTION WAS RENDERED "INEFFECTIVE" AS A PREDICATE FOR **ADEA** CIVIL ACTION BECAUSE THE CIVIL ACTION WAS INSTITUTED MORE THAN THIRTY DAYS AFTER THE NOTICE?

2. DID THE COURT OF APPEALS ADOPT THE ELECTION/EXHAUSTON OF ADMINISTRATIVE REMEDIES REQUIREMENT OF *CASTRO V. U.S.*, 775 F.2d 399 (1st Cir. 1985) AND *PURTILL V. HARRIS*, 658 F.2d 134 (3rd Cir. 1981), AND THUS CREATE A CONFLICT WITH THE DECISION IN *LANGFORD V. U.S. ARMY CORPS OF ENGINEERS*, 839 F.2d 1192 (6th Cir. 1985), WHEN IT HELD THAT THE UNTIMELY FILING OF A FEDERAL EMPLOYEE'S INTERNAL AGENCY **ADEA** COMPLAINT TIME BARRED HIS **ADEA** CIVIL ACTION, EVEN THOUGH THE EMPLOYEE HAD ALSO TIMELY FILED A NOTICE OF INTENT TO FILE SUIT PURSUANT TO 29 U.S.C. § 633a(d) NOT LESS THAN THIRTY DAYS PRIOR TO INSTITUTING HIS CIVIL ACTION?

RULE 28.1 STATEMENT

Parties to this case are:

Charles Z. Stevens, III, Petitioner

United States Department of the Treasury, Respondent

James A. Baker, III, former Secretary of the Treasury, Defendant/Appellee below

Nicholas F. Brady, Secretary of the Treasury (successor to James A. Baker, III as Secretary of the Treasury), Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Other Authorities:

Statutes:

TABLE OF AUTHORITIES (continued)

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CHARLES Z. STEVENS, III

PETITIONER

VS.

UNITED STATES DEPARTMENT OF THE TREASURY, NICHOLAS F. BRADY, SECRETARY, UNITED STATES DEPARTMENT OF THE TREASURY

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Charles Z. Stevens, III, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Charles Z. Stevens, III, v. United States Department of the Treasury, et al.*, No. 89-1432 (February 21, 1990).

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Texas has not been officially reported. The Memorandum Opinion and Order filed April 19, 1989 in Civil Action A-88-CA-340 appears as Appendix A hereto. The opinion of the United States Court of Appeals for the Fifth Circuit is also unreported. The *per curiam* panel opinion of February 21, 1990 in Case No. 89-1432, Summary Calendar appears as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1990. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

The statutory provisions involved in this Petition are subsections (b), (c) and (d) of § 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 633a(b) (c) (d). The statutory provisions appear as Appendix C hereto. The federal regulations pertinent to this petition are 29 Code of Federal Regulations, Part XIV, § 1613.214 and §§ 1613. 501-521 (1989). Said regulations appear as Appendix D hereto.

STATEMENT OF THE CASE

Plaintiff/Petitioner brought this civil action in the United States District Court for the Western District of Texas against his employer, the Defendant/Respondent United States Department of the Treasury and its chief Administrator, James A. Baker, III, then Secretary of the Treasury, under the Age Discrimination in Employment Act of 1967 (ADEA) 29 U.S.C. § 633a. Jurisdiction was conferred in the District Court by 29 U.S.C. § 633a(c) and 28 U.S.C. §§ 1331 and 1343.

Petitioners' suit alleged that he had been discriminated against on the basis of his age, sixty-three, when he was forced to withdraw from a Revenue Officer Trainee Program with the Internal Revenue Service and transfer to a lower grade position at the Internal Revenue Service Center. Meanwhile, younger employees with comparable records to his own, Petitioner asserted, were

allowed to either continue in or join the Revenue Officer Trainee Program.

The District Court tried the case on March 29, 1989 and took evidence as to both the merits and the jurisdictional issues on which it ultimately decided the claim. On April 7, 1989, it rendered its Order and Memorandum Opinion (App. A) dismissing Petitioner's complaint for lack of jurisdiction due to what the District Court found to be Petitioner's failure to comply with either the internal administrative filing requirements set forth in 29 U.S.C. § 633a(b) and the regulations promulgated thereunder, 29 CFR § 1613.201 et seq. or the alternative administrative procedures established by § 633a(d). Petitioner made a timely appeal to the United States Court of Appeals for the Fifth Circuit which disposed of the case on its summary calendar, rejecting part of the District Court's reasoning, but affirming the decision and the order of dismissal. (App. B)

The facts relevant to the decisions below are largely undisputed. Petitioner was forced to seek the demotion/transfer which he complains was age discriminatory on or about April 26, 1987. Although he did make some attempts to "grieve" this action by contacting his Congressman, he did not invoke the Department of Treasury internal Administrative grievance procedure until September 24, 1987. (App. A, p.A-2) This date was more than thirty days from the date of the alleged discrimination and his complaint was therefore untimely under the federal regulations governing filing of internal agency age discrimination claims, see 29 U.S.C. § 633a(b) and 29 CFR §§ 1613.214(a)(i); 1613.511. The District Court therefore found that, there being no good cause for the late filing, § 1613.214(a)(4), it had no § 633a(b) jurisdiction over the case.

However, because he had been advised from the start that the Department of Treasury was treating his complaint as having been filed out-of-time, Petitioner also attempted to preserve his right to pursue his claim in court by invoking an alternative administrative procedure set forth in § 633a(d) which bypasses the internal agency procedures. The only prerequisite to pursuing this avenue of relief under the ADEA is that a person file a notice of his intent to file a civil action within 180 days of the alleged discrimination and not *less* than thirty days before institution of a civil action, 29 U.S.C. § 633a(d). As was held by the Court of Appeals (App. B, pp.A-6, A-7) Petitioner filed this notice of intent to file suit on or about October 19, 1987, 176 days from the date of the alleged discrimination. Petitioner's complaint in District Court was then filed on May 4, 1988, more than thirty days after this notice of intent was filed. (App. B, p.A-7)

Nonetheless, both the District Court and the Court of Appeals held that Petitioner's § 633a(d) filing was also flawed as a jurisdictional foundation for the District court action. The District Court's ground for this conclusion, that the suit itself was not instituted within 180 days of the incident (App. A, p.A-3), is clearly based on an incorrect reading of the law. Although the Court of Appeals properly rejected the District Court's incorrect legal rationale, (App. B, p.A-7) the Court of Appeals did not specifically articulate its own rationale. However, Petitioner respectfully submits that any rationale that the Court of Appeals could have relied on in rejecting the Petitioners' claim that § 633a(d) vested jurisdiction in the District Court gives this Court reason to grant a Writ of Certiorari and review the decision.

REASONS FOR GRANTING THE WRIT

ARGUMENT I

THE COURT OF APPEALS HOLDING THAT THE PETITIONER'S SUIT WAS FILED TOO LONG AFTER THE FILING OF THE NOTICE OF INTENT IS DIRECTLY CONTRARY TO THE EXPRESS LANGUAGE OF THE ADEA AND TO ESTABLISHED PRECEDENT OF THIS COURT ON STATUTORY CONSTRUCTION.

The statutory scheme established by 29 U.S.C. § 633a permits federal employees to protect their right to be free from age discrimination in employment by filing actions in federal district court, 29 U.S.C. § 633a(c), provided only that the employee first complies with one of two alternative administrative prerequisites or predicates to filing such suit. The first alternative, controlled by 29 U.S.C. § 633a(b) and an extensive regulatory scheme set forth at 29 CFR, Chapter SIV, Part 1613, consists of a complex internal agency administrative, investigative and adjudicative process for ascertaining the merits of age discrimination complaints and for resolving them, 29 CFR §§ 1613.214-222; § 1613.511, culminating in an appeal to the EEOC as an appellate and enforcement body, § 1613.521 and ultimately, if the matter is not otherwise satisfactorily resolved, to federal court, § 1613.513. The § 633a(b) procedures must be invoked within thirty days of the alleged discrimination, or the right to employ them is lost, 29 CFR § 1613.214. (App. A, p.A-1).

The second alternative administrative prerequisite to suit, controlled by 29 U.S.C. § 633a(d) allows an employee to bypass the internal agency remedy by filing, within 180 days of the alleged discrimination, a notice of

his intent to file a civil action. (App. B, p.A-7).

Petitioner does not seek to challenge the determination that his efforts under § 633a(b) were untimely. He does, however, submit that this Court should review the decision by the Court below that his § 633a(d) efforts were also an ineffective predicate for his suit.

While enigmatic in several vital respects, the Court of Appeals decision is clear and unambiguous on three basic matters relevant to Petitioner's claim that he should be permitted to maintain this action pursuant to § 633a(d) of the ADEA:

First, the Court of Appeals held expressly that § 633a(d) is the portion of the statute relevant to the Petitioner's claim. (App. B, p.A-6, A-8).

Second, the court of Appeals held expressly that § 633a(d) is complied with by filing notice of intent to sue within 180 days of the act of discrimination complained of, but does not require that the actual suit be filed within that time (App. B, p.A-A-7).[1]

Third, the Court of Appeals found that the Petitioner did in fact file the requisite notice of intent to sue on or about October 19, 1987, (App. B, pp. A-6, A-7) which date is within 180 days of April 26, 1987, the date on which Petitioner alleges he was discriminated against.

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1. In holding this, the Court of Appeals reversed the erroneous conclusion of the District Court that § 633a required the actual suit to be filed within 180 days, (App. A, p.A-3). This error of the District Court may have had its origin in *dicta* in *Castro v. U.S.*, 775 F.2d 399, 403 (1st Cir. 1985) and *McKinney v. Dole*, 765 F.2d 1129, 1140 (D.C. Cir. 1985).

Notwithstanding these correct conclusions, however, the Court of Appeals reached the rather startling further conclusion that Petitioner's otherwise timely filing of a notice of intent to file suit was "not effective" as a predicate for the instant civil action because Petitioner "did not initiate the present action in federal court until May 4, 1988." (App. B, p.A-7) This is somewhat puzzling because the date, May 4, 1988, is clearly a date "not less than thirty days", § 633a(d), after the filing of the notice of intent to sue.[2]

The Court of Appeals does not articulate its rationale for why the May, 4, 1988 suit filing renders the October 19, 1987 notice filing "not effective." However, if it is the

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2. This date is also well within any statute of limitations which might apply to this action. ADEA actions by non-federal employees, 29 U.S.C. § 626, must be filed within the time provided for under the Portal to Portal Act, 29 U.S.C. § 255 which establishes a two-year statute of limitations for non-wilful violations and three-year statute for wilful violations. This Court has not spoken on whether or not this statute of limitations applies to federal employee **ADEA** actions, though at least one lower court has assumed that it did, *Wiersma v. Tennessee Valley Authority*, (Civil Action No. 3-85-1160 Eastern District of Tennessee, March 12, 1986), 41 BNA FEP CAS 1588, 41 CCH EPD Paragraphs 36518, 36519. Even if the distinction between federal and non-federal employee actions under the ADEA were to prevent this statute of limitations from applying, see *Lehman v. Nakshian*, 453 U.S. 156 (1972), the only other applicable limitation would be that contained in 28 U.S.C. § 2401(a) which establishes a six year limitation period for initiating actions against the United States. This is, apparently, the statute of limitations the employee manual furnished to Petitioner contemplates (Tr. p.22). A final alternative would be that in not specifically prescribing a statute of limitations under § 633a the Congress was simply setting up a scheme parallel to that under Title VII of the Civil Rights Act of 1964 which prescribes no absolute limitation for the filing of actions under that statute, but simply requires that, unless otherwise excused by equitable modifications, *Zipes v. TWA, Inc.*, 455 U.S. 385 (1982), the administrative procedure be invoked within 180 days. Section 633a(d) simply requires invoking the administrative procedure through notice of intent to file suit within 180 days of the alleged discrimination, something which the Petitioner here did.

seven month time lapse between those two dates, then the Court of Appeals apparently misread the statute and interpreted the provision requiring that suit be filed after giving notice of "not *less* than thirty days" 29 U.S.C. § 633a(d) (emphasis added) as if it meant that suit must be filed "not *more* thirty days" from the notice. Thus, the Court of Appeals apparently construed the statute to mean that the notice was "not effective" because May 4th is more than thirty days from October 19th.[3]

The clear language of the statute does not support this reading. The statute states specifically that

> [no] civil action may be commenced . . . under this section until the individual has given the Commission *not less than thirty days notice of intent to file* [a civil] action, 29 U.S.C. § 633a (d). (emphasis added)

In plain English, this statute says that the Commission must be given a minimum of thirty days notice. It does not, however, prevent a notice longer than thirty days from being effective.

Although this Court has had one occasion to interpret the language of and congressional intent underlying the federal protective provision of the ADEA contained in 29 U.S.C. § 633a, *Lehman v. Nakshian*, 453 U.S. 156 (1972) it does not address the specific language at issue here. However, it is a fundamental tenet of statutory construction that the plain language of a statute establishes the

3. In concluding this, the Court of Appeals may simply have adopted a similar error made by the District Court when the District Court held that under § 633a(d) a complainant is required to "notify the EEOC within thirty days prior to commencing suit" (App. A, p.A-3).

meaning of a statute unless there is an ambiguity of language or express legislative intent to the contrary, *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981), *Jefferson County Pharmaceutical Association v. Abbott Laboratories*, 460 U.S. 150, 157, *reh. den.* 460 U.S. 1105 (1983), *Escondido Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772, *reh. den.* 467 U.S. 1267 (1984), *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), or the circumstances of enactment indicate otherwise, e.g., *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981) or reliance on the specific language would defeat the plain purpose of the statute, e.g., *Bob Jones University v. U.S.*, 461 U.S. 574, 586 (1983).

Petitioner submits that there is no basis in the instant case to construe § 633a(d) any way other than as it literally reads: that an ADEA civil action filed at any time thirty days or more after the filing of a notice of intent is timely and that the passage of seven months does not render a otherwise timely notice of intent "not effective" as a predicate to suit. This Court should grant Petitioner's Writ to correct this clear error of law on the part of the Court of Appeals.

ARGUMENT II

THE COURT OF APPEALS, IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS, ERRONEOUSLY BOUND PETITIONER TO AN ELECTION AND EXHAUSTION OF REMEDIES NOT REQUIRED BY THE STATUTE.

An alternative rationale for the Court of Appeals' conclusion that Petitioner's otherwise timely § 633a(d) notice was not an effective jurisdictional predicate for the instant case lies in a combined election and exhaustion of

remedies theory. Under that theory, the Court of Appeals' affirmance of the dismissal of Petitioner's case rests on an underlying conclusion that Petitioner's attempt to invoke the § 633a(b) internal remedies — even though the effort was untimely and therefore ineffective to him as an avenue of relief — precluded altogether his use of the § 633a(d) notice option as a predicate for his suit.

Petitioner submits that this is contrary to the language and purposes of § 15 (29 U.S.C. § 633a) of the ADEA: to extend to federal employees a substantive right to protection against age discrimination in employment, *Nakshian*, 453 U.S. at 167, and to accord federal employees the right to enforce this protection in the federal courts, 453 U.S. at 162.

Like other anti-discrimination statutory schemes, the ADEA should be liberally construed in order to maximize its remedial purposes and avoid unduly restrictive procedural barriers to access by aggrieved persons to the courts, *Zipes v. TWA, Inc.*, 455 U.S. 385, 395 n.11 (1982), see also *Ray v. Nimmo*, 704 F.2d 1480, 1483-84, (11th Cir. 1983). Congress furthered this effort when it extended the ADEA to federal employees in 1978 by eliminating a procedural barrier which it had previously imposed on federal race and sex discrimination claimants under § 717 of Title VII of the Civil Rights Act: that of requiring exhaustion of internal agency remedies prior to going to court, 42 U.S.C. § 2000e-16(c), *Brown v. General Services Admn.*, 425 U.S. 820 (1976). Instead, when Congress adopted the federal ADEA provisions, it specifically gave federal age discrimination claimants the option of bypassing the agency procedures, 29 U.S.C. § 633a(d), *Proud v. U.S.*, 872 F.2d 1066 (D.C. Cir. 1989). When the Equal Employment Opportunity Commission promulgated regulations covering federal employee age claims, 29 CFR § 1613.501-521, it

incorporated much of the procedural regulatory scheme it had developed under Title VII, §§ 1613.511. However, it specifically excluded all references to requiring final agency action as a predicate for suit under the ADEA, e.q. §§ 1613.514; 1613.521.

Notwithstanding this relatively straightforward statutory scheme, a conflict has developed among the circuits as to whether or not the ADEA means what it says about permitting federal employees to bypass the administrative process, compare *Langford v. U.S. Army Corp. of Engineers*, 839 F.2d 1192, 1194-95 (6th Cir. 1988) with *Castro v. U.S.*, 775 F.2d 399, 404 (1st Cir. 1985), and *Purtill v. Harris*, 658 F.2d 134, 137 (3rd Cir. 1981) *cert. den.*, 462 U.S. 1131 (1983).[4] With its decision in the instant case, the Fifth Circuit has inserted itself directly into this conflict.

The most recent court to consider this issue at length has been the Sixth Circuit in *Langford*, 839 F.2d at 1194-95, in which it concluded that the law did not require a federal ADEA plaintiff to irretrievably elect between his 633a(b) and 633a(d) remedies. The *Langford* Court allowed the plaintiff to proceed in court on the basis of a § 633a(d) filing even though he had deliberately abandoned § 633a(b) procedures in order to do so. The District Court had dismissed the plaintiff's complaint specifically on the

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[4] The Ninth Circuit has inclined towards the *Purtill* and *Castro* election/exhaustion requirements, see *Romain v. Shear*, 799 F.2d 1416 (9th Cir. 1986) *cert den.*, 481 U.S. 1050 (1987), *Limongelli v. U.S.P.S.*, 707 F.2d 368, 373 (9th Cir. 1983). Unlike *Langford*, *Castro*, and *Purtill*, however, the Ninth Circuit cases did not require disposition on this issue to arrive at the outcome and therefore did not address the issue in depth. The Eleventh Circuit, in *Ray v. Nimmo*, 704 F.2d at 1484-85, n.12, acknowledges the existence of the election/exhaustion issue and, though apparently inclined towards the *Langford* position, declined to directly address the issue as it was not necessary for disposition of the case.

grounds that once the § 633a(b) internal agency route had been elected by the plaintiff it could not be abandoned in favor of a § 633a(d) direct one, *Langford*, 839 F.2d at 1194.

The Sixth Circuit Court of Appeals, however, reversed and held that:

> Unlike the Civil Rights Act which generally requires exhaustion of administrative remedies before a government employee ... may file a civil action, see 42 U.S.C. § 2000e-16(c), the ADEA provides two separate avenues of relief to a federal employee ... who believes that he has been a victim of age discrimination...(:)
>
> * * *
>
> He may file an administrative complaint with the employing federal agency and if the employing agency's determination is adverse to him, he may appeal to the [EEOC] for administrative review, 29 U.S.C. § 633a(b), see 29 C.F.R. §§ 1613.501 - 1613.521 (1980). After the administrative complaint has been filed with the commission, a civil action may then be instituted. 29 U.S.C. §§ 633a(c),(d). Alternatively, the employee has the option under the Act to bypass the administrative process *either in part or in its entirety* and proceed directly to federal court thirty days *after* notice of intent to sue has been given to the [EEOC] as long as such notice is given 'within 180 days after the alleged unlawful practice occurred'. 29 U.S.C. § 633a(d) ... (emphasis added)(citations omitted) 839 F.2d at 1194-95.

The Sixth Circuit relies on the statutory language and EEOC regulations in finding that Congress' decision to allow ADEA claimants direct access to the Courts overrode any policy arguments for encouraging administrative resolution of claims before permitting access to Court. Ironically, it derived much of its rationale from the case of *Patterson v. Weinberger*, 644 F.2d 521, 523-525 (5th Cir. 1981), a decision which the Fifth Circuit panel in the instant case does not even refer to, and which is apparently no longer considered binding law by the Courts in the Fifth Circuit.[5]

As the *Langford* Court acknowledges, its interpretation that § 633a permits an employee to pursue § 633a(d) efforts even after attempting to invoke § 633a(b) procedures is directly at odds with decisions in the Third and First Circuits, *Purtill*, 658 F.2d 134, *Castro*, 775 F.2d 399. These cases hold that encouraging administrative resolution of federal employee age discrimination claims is more important under the statutory scheme than permitting direct access by these claimants to federal court. They therefore hold that federal employees, once they attempt to invoke the internal administrative process, are irrevocably bound to it and may not invoke any other method of dispute resolution.

Petitioner, of course, submits that the *Langford* position is the better one. However, for purposes of this Petition, Petitioner merely urges that this Court recognize the

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[5] Although the Fifth Circuit recently cited *Patterson* with approval, *Irwin v. V.A.*, 874 F.2d 1092, 1096, n.25 (5th Cir. 1989) § 633a(d) jurisdiction was rejected in that case not because 633a(b) procedures had been invoked, but because the notice the plaintiff relied on as a § 633a(d) notice did not mention the age claim. The only reported case in the Fifth Circuit addressing the viability of *Patterson* in the present context, other than the instant case, is a decision of the same District Court which expressly rejects the argument that *Patterson* mandates a *Langford* approach, and instead adopts the *Purtill* and *Castro* decisions as "more persuasive." *White v. Franks*, 718 F.Supp. 592, 595 (W.D. Tx 1989).

irreconcilable conflict among the circuits on this important question of law and requests that certiorari be granted to resolve it.[6]

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that his Petition for Writ of Certiorari should be granted; the Writ should issue to the United States Court of Appeals for the Fifth Circuit, and his case should thereby be reviewed.

Respectfully submitted,
CHARLES Z. STEVENS, III

By: /s/ Alison Steiner
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6 Although certiorari was sought and denied in both *Romain v. SHear*, 481 U.S. 1050, and *Purtill v. Harris*, 462 U.S. 1131, neither petition sought review of the election/exhaustion question, see *Romain v. Shear*, 55 U.S.L.W. 3734 (1987), *Purtill v. Schweiker*, 51 U.S.L.W. 3062 (1982).

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
APR 7 1989

CHARLES STEVENS

V. A-88-CA-340

U.S. TREASURY DEPARTMENT

ORDER AND MEMORANDUM OPINION

BEFORE THIS COURT on March 29, 1989 came the parties for trial on Plaintiff's claim that he was terminated by the U.S. Treasury Department in violation of the Age Discrimination in Employment Act. On agreement of the parties the cause was tried without a jury. Defendant, from the outset, claimed that the Court lacks jurisdiction over this matter because Plaintiff failed to contact an agency Equal Employment Opportunity Counselor within 30 days of the alleged discriminatory act as required by 29 C.F.R. Sec. 1613.214(a) and 29 U.S.C. Sec. 633a(b). The Court heard testimony on the jurisdictional issues as well as the merits of Plaintiff's ADEA claim. Upon review of the evidence and arguments of counsel, the Court is of the opinion that the jurisdictional issue is dispositive of the case. The Court will not reach the merits of Plaintiff's claim.[1]

1. The Court notes that the parties were ably represented by counsel. Though this cause will be dismissed on jurisdictional grounds, the Record demonstrates that during the period relevant to 29 C.F.R. Sec. 1613.214(a), counsel had not been contacted by the Plaintiff.

Findings of Fact

Charles Z. Stevens was employed at the Austin Service Center, Internal Revenue Service, from January 1985 to August 16, 1986 at the Government Service grade 6 level. On August 17, 1986, Stevens became a Revenue Officer in Training at the grade 7 level. During the probationary period of his employment, on April 26, 1987, Stevens was asked to resign from the Revenue Officer Training program and returned at lower rank to a Tax Examining Assistant position. This is the employment decision from which Stevens seeks redress under the Age Discrimination in Employment Act.

The Court finds that during the Revenue Officer Orientation Training from August 17, 1986 to August 21, 1986 Stevens was instructed about the Equal Employment Opportunity filing procedures. Though it is unclear whether Stevens affirmatively stated to superiors that he believed that his age was used as an impermissible criteria in the employment decision, on a date no later than May 21, 1987, in a letter to his Congressman, Stevens determined that age was a determining factor in the employment decision of April 26, 1987.

On September 24, 1987 Stevens requested an interview with an EEO Counselor and on September 29, 1987 accomplished the interview. On October 19, 1987, Stevens filed a complaint with the Department of Treasury alleging discrimination in violation of the ADEA in the decision of April 26, 1987.

The Court finds that at Plaintiff's work locations EEO notices were prominent and that EEO materials were given to Plaintiff. Stevens was given substantial and adequate notice of the limitations requirements for bringing an

EEO complaint.

Plaintiff has not demonstrated equitable grounds to toll the running of the 30 day limitations.

Conclusions of Law

Under the Age Discrimination Employment Act, 29 U.S.C. Sec. 633a, an employee who believes that he has been discriminated against because of age has two avenues of relief under the ADEA. The employee may proceed directly to federal court and initiate an action no later than 180 days from the unlawful action and notify the EEOC within 30 days prior to commencing suit. 29 U.S.C. Sec. 633a(d). In the alternative, the employee may file an administrative complaint with the employing federal agency and appeal an adverse finding to the Equal Employment Opportunity Commission. Under this second procedure, an unsatisfied employee may bring a federal civil action only after exhausting his administrative remedies. 29 U.S.C. Sec. 633a(b).

Because Stevens did not timely bring an EEO grievance, he must demonstrate that he was not aware of the applicable EEO administrative procedures or that there are circumstances which entitle him to an equitable tolling in the commencement of the running of the 30 day time period. 29 C.F.R. Sec. 1613, 214(a)(4); *Oaxca v. Roscoe*, 641 F.2d 386, 391 (1981).

Plaintiff failed to demonstrate equitable grounds to toll the commencement of the running of the 30 day time period prior to filing with the EEO. There is no evidence in the Record other than Plaintiff's statement that he did not see the EEO notices to support a finding that he was not informed of the filing requirement. As alternate grounds

for the delay, Plaintiff states that his letter to a United States Representative supports a finding that Plaintiff pursued other grounds to seek redress. However, the EEO guidelines state with specificity the correct steps an employee must take to invoke the protection of federal law from employment discrimination. Though contacting a Congressman may be effective, it does not preserve the EEO and civil litigation remedy. There are insufficient grounds to support an equitable tolling of the limitations period.

FOR THE FOREGOING REASONS, this Court is without jurisdiction to apply Age Discrimination Employment Act to the circumstances of Stevens' demotion in April, 1987.

IT IS ORDERED that the above-numbered cause is dismissed with prejudice. Cost are assigned to the party incurring them.

SIGNED AND ENTERED, this, the 5th day of April, 1989.

/s/ Lucius D. Bunton
Lucuis D. Bunton
Chief Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1432
Summary Calendar

CHARLES Z. STEVENS III,
Plaintiff-Appellant,

versus

UNITED STATES DEPARTMENT
OF THE TREASUREY, et al.,
Defendants-Appellees

From the United States District Court
for the Western District of Texas
(A 88 CA 340)

(February 21, 1990)

Before REAVLEY, KING, and JOHNSON, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This is an appeal from the district court's dismissal of Charles Z. Stevens III ("Stevens") action against the United States, under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 623 et seq. Stevens argues that the district court erred in finding that Stevens failed to file a complaint with the Equal Employment Opportunity Commission ("EEOC") in a timely manner.

I. *Facts and Procedural History*

The facts are not in duspute. Stevens was employed at the Austin Service Center of the Internal Revenue Service, from January 1985 to August 16, 1986. On August 17, 1986 Stevens became a Revenue Officer in Training at the grade seven level. During the probationary period of his employment, Stevens was asked to resign from the training program and he was returned to his previous rank on April 26, 1987.

On September 24, 1987 Stevens requested an interview with an EEO Counselor, and received an interview on September 29, 1987. Stevems did not file a complaint or a notice of an intent to file a civil action with the EEOC until October 19, 1987. The district court determined that this was not timely. This Court affirms.

II. *Holding and Reasons*

The district court cited section 633a(d) of the ADEA to support its decision that Stevens did not file a timely complaint with the EEOC. The district court explained the law as follows:

> [A]n employee who believes he has been discriminated against has two avenues of relief under the ADEA. The employee may proceed directly to federal court and *initiate an action no*

> *later than 180 days* from the unlawful action and notify the EEOC within 30 days prior to commencing suit, * * * In the alternative, the employee may file an administrative complaint with the employing federal agency and appeal an adverse finding to the [EEOC]. Record Excerpt p. 5 (emphasis added).

The relevant portion of section 633a(d) states:

> [n]o civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file [a civil] action. *Such notice shall be filed [with the EEOC] within one hundred and eighty days* after the alleged unlawful practice occurred. (emphasis added).

Contrary to what the district court stated, Stevens had to file a notice of intent to sue with the EEOC within 180 days of the alleged discriminatory action. Stevens did not have to initiate his federal action within 180 days of the alleged action, but merely give notice to the EEOC of his intention to initiate a civil action. Stevens stated at the bottom of his complaint of October 19, 1987 that his complaint would also serve as notice of Stevens' intention to file a civil claim. However, Stevens did not initiate the present action in federal court until May 4, 1988, therefore Stevens' notice to the EEOC, of October 19, 1987 was not effective.

Stevens' contention that sections of the Code of Federal Regulations indicate that the district court erred, is without merit. The sections cited by Stevens do not apply to federal employees.

III. *CONCLUSION*

Although the district court did not state the applicable law correctly, ultimately the correct result was reached since Stevens failed to meet the requirements set forth in 29 U.S.C. 633a(d).

AFFIRMED

APPENDIX C

29 U.S.C. § 633a provides in pertinent part:

> (b) Except as otherwise provided in this subsection, the Civil Service Commission is authorized to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Civil Service Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—
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> (1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a);
> (2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and
> (3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.
>
> The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Civil Service Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this

section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

(d) When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

APPENDIX D

29 CFR ch. XIV, Part 1613 provides in pertinent part:

§ 1613.214 Filing and processing of complaint.

(a) *Time limits.* (1) An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if:

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the date of receipt of the notice of the right to file a complaint.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge, in writing, to the complainant or representative receipt of the complaint and advise the complainant in writing of all administrative rights and of the right to file a civil action as set forth in §1613.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons considered sufficient by the agency.

(b)*Representation and official time.* (1) At the stage in the processing of a complaint, including the counseling stage under §1613.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(2) If the complainant is an employee of the agency, he/she shall have a reasonable amount of official time to prepare the complaint if otherwise on duty. If the complainant is an employee of the agency and he designates another employee of the agency as his/her representative, the representative shall have a reasonable amount of official time, if otherwise on duty, to prepare the complaint. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the commission

during the investigation, informal adjustment, or hearing on the complaint.

(3) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission (or the agency prior to a hearing on the complaint) may, after giving the representative an opportunity to respond, disqualify the representative.

Subpart E—Nondiscrimination on Account of Age

GENERAL PROVISIONS

§ 1613.501 Purpose and applicability.

(a) *Purpose.* This subpart sets forth the policy under which an agency shall establish a continuing program to assure nondiscrimination on account of age and the regulations under which an agency will process complaints of discrimination on account of age.

(b) *Applicability.* (1) this subpart applies (i) to military departments as defined in section 102 of title 5. United States Code, and Executive agencies as defined in section 105 of title 5. United States Code, the United States Postal Service and the Postal Rate Commission, and to the employees thereof, including employees paid from non-appropriated funds, and (ii) to those units of the legislative and judicial branches of the Federal Government and the Government of the District of Columbia hav ing positions in the competitive service and to the employees of those positions. (2) This subpart does not apply to aliens employed outside the limits of the United States. (3) Except as provided by paragraph (b)(2) of this section, this subpart applies to applicants for positions to which paragraph (b)(1) of this section applies. (4) This

subpart applies to employees and applicants for employment who are at least 40 years of age.

(c) *Exceptions.* Reasonable exemptions to the provisions of this subpart may be established by the Commission for each position for which the Commission establishes a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position.

§ 1613.502 General Policy.

It is policy of the Government of the United States (and of the government of the District of Columbia) to prohibit discrimination in employment on account of age to assure that all personnel actions affecting employees or applicants for employment are free from discrimination on account of age.

AGENCY REGULATIONS FOR PROCESSING COMPLAINTS OF DISCRIMINATION

§ 1613.511 General.

An Agency shall provide regulations governing the acceptance and processing of complaints of discrimination on account of age which, subject to § 1613.514, comply with the principles and requirements in §§ 1613.213 through 1613.222, 1613.241 and 1613.261 through 1613.271 of this part.

§ 1613.512 Coverage.

The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment with the agency who believes

that he or she has been discriminated against on-account of age and who, at the time of the action complained of, was an employee or applicant for employment at least 40 years of age. A complaint may also be filed by an organization for the person with his or her consent.

§ 1613.513 Effect on Administrative Processing.

The filing of a civil action by an employee or applicant involving a complaint filed under this subpart terminates processing of that complaint.

§ 1613.514 Exclusions.

Sections 1613.281 and 1613.282 shall not apply to the processing of discrimination complaints on account of age. The reference to § 1613.281 in §§ 1613.215, 1613.217, 1613.220, and 1613.221 may not be included in agency regulations required by this subpart.

§ 1613.521. Appeal to the Commission.

Except for the requirements in § 1613.234 that the decision of the Office of Review and Appeals contain a notice of the right to file a civil action in accordance with § 1613.282, §§ 1613.231 through 1613.240 of this part shall apply to this subpart.